Nos. 87-1589 and 87-1888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD,
Petitioner,
v.
RAILWAY LABOR EXECUTIVES' ASSOCIATION and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

INTEREST OF *AMICI CURIAE*

Chicago & North Western Transportation Company ("C&NW") and Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") are the respondents in *Railway*

Labor Executives' Ass'n v. *Chicago & N.W. Transp. Co., petition for certiorari pending*, No. 87-2049 (hereinafter the "*C&NW/DM&E case*"), which is being held by this Court pending its decision in Nos. 87-1589 and 87-1888, the two *Pittsburgh and Lake Erie Railroad* ("*P&LE*") cases. The *C&NW/DM&E* case presents issues that are presented by No. 87-1888 ("*P&LE II*").

The *C&NW/DM&E* case was the first of the pending cases in which the Railway Labor Executives' Association ("RLEA"), the respondent in the *P&LE* cases, and its member unions have attempted to invoke the "status quo" provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, to enjoin sales of rail line under § 10901 of the Interstate Commerce Act (Subtitle IV of 49 U.S.C.) pending exhaustion of RLA major dispute procedures over the effects of the sales on the sellers' employees. The Interstate Commerce Commission has authorized consummation of such sales on an expedited basis, generally without imposing formal "labor protective conditions" to insulate employees from the effects of the sales, pursuant to a class exemption order and regulations promulgated under § 10505 of the Act. *Ex Parte No. 392 (Sub-No. 1)—Class Exemption For The Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), codified at 49 C.F.R. §§ 1150.31-34, *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

The C&NW, which like other Class I rail carriers has had serious revenue adequacy problems for years,[1] has

[1] No Class I railroad has been "revenue adequate" for the past several years—none of them have generated sufficient revenues from their rail operations to cover their costs and yield a reasonable return on investment. See *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C.2d 966 (1987); *Railroad Revenue Adequacy—1985 Determination*, 3 I.C.C.2d 541 (1987); *Railroad Revenue Adequacy—1984 Determination*, 1 I.C.C.2d 615 (1986); *Railroad Revenue Adequacy—1983 Determination*, 1 I.C.C.2d 734 (1984).

been obliged to abandon more than 5000 miles of its track in the past decade alone. In *Ex Parte No. 392*, however, the ICC attempted to alleviate the need for such abandonments, with their attendant loss of railroad jobs and service, by facilitating an alternative means of disposing of marginal or unprofitable lines: sales and other transfers to newly-created short line or regional railroads that typically have lower operating costs than the larger carriers.

In *Ex Parte No. 392*, the ICC exercised its exemption authority under § 10505 of the Act to relieve sales to new entrants into the industry from detailed prior review requirements under § 10901, substituting an expedited "method * * * to acquire Commission approval" under which these sales may be consummated upon seven days' notice to the Commission. 1 I.C.C.2d at 811, 820.[2] The ICC also declined RLEA's request that labor protective conditions be imposed on these transactions. The Commission determined that as a general matter such protection is not warranted. Sales of these lines to new carriers ordinarily preserve jobs for rail employees that would otherwise ultimately be lost in abandonments, and thus constitute the best protection available in most cases; and the cost of labor protection conditions would "discourage acquisitions and operations that should be encouraged." *Id.* at 814-15. However, the ICC recognized that in "an extraordinary case" labor protection might be warranted and consistent with the public interest in encouraging line sales, and thus the ICC reserved jurisdiction to resolve disputes over labor protection in particular cases on petitions under § 10505(d) of the ICA for revocation of the class exemption. *Id.* at 815.[3] RLEA

[2] The ICC has since extended the preconsummation notice period for certain large-scale § 10901 transactions to 35 days. 53 Fed. Reg. 5981 (Feb. 29, 1988).

[3] The ICC has said that it will impose labor protection under *Ex Parte No. 392* in "situations in which there was misuse of the

appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed *per curiam* "for the reasons set forth in the decision of the Commission." *Illinois Commerce Comm'n* v. *ICC*, *supra*. RLEA did not seek certiorari.

In August 1986, C&NW and DM&E obtained ICC authority under *Ex Parte No. 392* for the sale to DM&E of C&NW's line between Winona, Minnesota and Rapid City, South Dakota. *Dakota, M. & E. R.R.—Acquisition & Operation Exemption*, 51 Fed. Reg. 32260 (Sept. 10, 1986). That line had previously been the subject of abandonment proceedings before the ICC, and at the time of the sale was in part inoperable due to debilitation of the track. Indeed, only some 169 C&NW employees were deployed along the line—most of whom DM&E, a newly-formed carrier, offered to employ.

Nonetheless, RLEA's member unions opposed the sale when announced in July 1986, and they served notices on C&NW, ostensibly under § 6 of the RLA, demanding that C&NW agree to provide, and to require any line purchaser such as DM&E to provide, the labor protection that the ICC had declined to grant in *Ex Parte No. 392*.[4] RLEA

Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection * * * [or] where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the benefits of the Commission's existing policy [encouraging sales of marginal line to new operations] for other communities or locales." *FRVR Corp.—Exemption Acquisition & Operation—Certain Lines of Chicago & N.W. Transp. Co.—Petition for Clarification*, I.C.C. Finance Docket No. 31205, (served Jan. 29, 1988) (Appendix, Petition for Certiorari, No. 87-1888, at 109a, 113a-114a), *aff'd as clarified on other grounds sub nom. Railway Labor Executives' Ass'n* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988), *petition for rehearing pending*.

[4] The union notices sought so-called *New York Dock* and *Oregon Short Line III* protections, the conditions that the ICC typically imposes on rail mergers and abandonments, respectively. See *New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979).

then brought suit on August 19, 1986 against C&NW and DM&E in the United States District Court for the District of Minnesota, claiming that C&NW was obliged to exhaust RLA "major dispute" procedures with respect to the effect of the sales on employees, and that the Act's "status quo" requirements for major disputes prohibited consummation of the sale in the meantime.

On August 27, 1986, the district court denied RLEA's motion for a preliminary injunction against the sale, stating that the relief sought would put the court "at loggerheads" with the decision of the ICC. (Appendix to Petition for Certiorari, No. 87-2049, at 9a-10a). The sale was thereafter consummated on September 4, 1986. RLEA continued to claim that the consummation of the sale and the effects on employees violated the RLA status quo requirements and sought injunctive relief and back pay with respect to the alleged violation.

On January 7, 1987, the district court granted motions by C&NW and DM&E for summary judgment, holding that the relief sought by the unions could not be granted because it would constitute an impermissible collateral attack on the ICC's authorization of the sale: A "decision favorable to plaintiff would put this Court directly at odds with the regulatory scheme established by *Ex Parte 392*," where the ICC had indicated "that it is the final authority in determining whether to impose labor protection in the sale of lines to the new carriers. * * * Because the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has * * * exclusive authority to modify or rescind *Ex Parte 392*" under the Hobbs Administrative Orders Review Act, 28 U.S.C.

§ 2342(5). (Appendix to Petition for Certiorari, No. 87-2049, at 6a-7a.)

On appeal, the Eighth Circuit affirmed on the alternative ground that "the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA," without reaching the collateral attack issue. (*Id.* at 4a).

In *P&LE II*, the Third Circuit rejected both the collateral attack theory on which the district court decided the *C&NW/DM&E* case and the supersession theory on which the Eighth Circuit affirmed that case. Since RLEA's petition for certiorari in the *C&NW/DM&E* case is being held by this Court pending a decision of the *P&LE* cases, the parties here have a direct interest in the outcome of those cases, particularly *P&LE II*. We believe that the supersession issue was correctly decided by the Eighth Circuit in *C&NW/DM&E*. We anticipate, however, that that issue will be fully developed in the briefs to be filed by P&LE and by other *amici*, as it was discussed at length by the Third Circuit in *P&LE II*. But we are concerned that the collateral attack issue may receive less emphasis in other briefs than it deserves, particularly since the discussion of the issue in *P&LE II* was cursory. (Appendix, Petition for Certiorari, No. 87-1888 ["Pet. App."] at 36a-43a). Hence, we believe that we can best assist the Court in this *amicus* brief by limiting our argument to the collateral attack issue.

SUMMARY OF ARGUMENT

The Hobbs Administrative Orders Review Act gives the courts of appeals "exclusive jurisdiction" to "enjoin, set aside, [or] suspend (in whole or in part)" any order or decision of the ICC. 28 U.S.C. § 2342(5). The Third Circuit in *P&LE II* nonetheless held that the district court had jurisdiction to enjoin consummation of a line sale expressly determined by the ICC to be in the public

interest and thereby to give the unions an opportunity to demand labor protections that the ICC expressly found to be contrary to the public interest. Permitting such a collateral attack on an ICC order flouts the plain and unambiguous language of the Hobbs Act, and is squarely contrary to controlling precedent in this Court.

ARGUMENT

The Decision in *P&LE II* Allowed an Impermissible Collateral Attack on an ICC Decision, in Violation of the Hobbs Act

Reversal of the decision in *P&LE II* is required by the Hobbs Act, without regard to the merits of issues as to the proper accommodation of the RLA and the Interstate Commerce Act. Under the Hobbs Act, courts of appeals have "*exclusive* jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or * * * determine the validity" of any order or decision of the Interstate Commerce Commission. 28 U.S.C. § 2342(5) (emphasis added); see also 28 U.S.C. § 2321(a). In *Venner* v. *Michigan Cent. R.R. Co.*, 271 U.S. 127 (1926), this Court held that a predecessor provision precluded relief in a collateral proceeding that in effect would nullify such an order, because such relief is allowable only on direct review of the Commission decision. "While the amended bill does not expressly pray that the order be annulled or set aside, it does * * * pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside." 271 U.S. at 130.

Here, under its *Ex Parte No. 392* procedures, the ICC authorized the P&LE sale effective September 26, 1987. The district court nevertheless enjoined consummation of the sale for an indefinite period extending far beyond that date to give the unions leverage to demand that P&LE accept the labor protection conditions that the

ICC had refused to impose. The Third Circuit affirmed that injunction, even though it recognized that the delay "could effectively kill the proposed transaction" and that this "could well be contrary to the strong congressional policy in favor of rehabilitating the railroad industry." (Pet. App. at 39a). In short, the court below allowed the district court to enjoin P&LE from doing what the ICC "specifically authorized * * *," contrary to the square holding of *Venner* that such relief is impermissible except on direct review of an ICC order. The Third Circuit sought to distinguish *Venner* on the ground that the injunction sought in that case "truly would have blocked the approved transaction as violative of state law, as opposed to merely delaying the transaction pending the exhaustion of bargaining"; and because that case, "at bottom, was a federal preemption case * * *." (Pet. App. at 38a-39a n.27). But the ICC authorized consummation of the P&LE sale without delay under the *Ex Parte No. 392* procedure that was expressly intended to allow expedited consummation, without regard to "the exhaustion of bargaining"; and the sole ground relied upon by this Court in *Venner* was the improper collateral attack upon the ICC decision, not what the case might be thought to be "at bottom."

The Third Circuit relied primarily on the fact that the ICC's authorization of the sale was permissive rather than mandatory. (Pet. App. at 37a-38a). That distinction is flatly contrary to *Venner* and is fundamentally wrong in principle. In *Venner*, this Court expressly held that the fact that "*the order is not mandatory but permissive makes no difference in this regard.*" 271 U.S. at 131 (emphasis added). This Court was clearly correct, because by enjoining what the ICC has authorized, the district court's order "enjoin[s], set[s] aside," and "suspend[s]" the ICC's order, precisely what the Hobbs Act allows only on direct review by a court of appeals. Accordingly, the Second Circuit has explicitly rejected the permissive-mandatory distinction.[5] Other courts of appeals have repeatedly dismissed as collateral attacks cases involving RLA claims for relief that would have interfered with consummation of transactions authorized, *but not required*, by the Interstate Commerce Commission,[6] and by the Civil Aeronautics Board when it had jurisdiction over airline transactions like that of the ICC over railroad transactions.[7]

The Third Circuit also suggested it is significant that, under § 10901, the ICC need find only that the public interest "permits" a line sale and not that the public interest requires that the transaction proceed or that a delay in consummation would harm the public interest.

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[5] *Railway Labor Executives' Ass'n* v. *Staten Island R.R.*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

[6] *E.g.*, *United Transp. Union* v. *Norfolk & W. Ry.*, 822 F.2d 1114, 1120-1121 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988); *Brotherhood of Loc. Eng.* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-802 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1987).

Several district courts have so held in *Ex Parte No. 392* cases: in addition to the district court's holding in the *C&NW/DM&E* case, see, *e.g.*, *Chicago & N.W. Transp. Co.* v. *Railway Labor Executives' Ass'n*, No. 88-C-0444 (N.D. Ill. Mar. 16, 1988), *aff'd on other grounds*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988); *United Transp. Union* v. *Burlington N. R.R.*, 672 F. Supp. 1579 (D. Mont. 1987), *appeal pending*, No. 87-4386 (9th Cir.).

[7] *E.g.*, *Carey* v. *O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Kesinger* v. *Universal Airlines*, 474 F.2d 1127, 1131-1132 (6th Cir. 1973); *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 270, 275-278 (7th Cir. 1965), *cert. denied*, 382 U.S. 926 (1965).

The only court of appeals decision to the contrary of which we are aware, apart from the Third Circuit decision in *P&LE II*, is the Fifth Circuit's decision in *Railway Labor Executives' Ass'n* v. *City of Galveston*, 849 F.2d 145 (5th Cir. 1988), *petition for certiorari pending*, No. 88-517, which followed the Third Circuit without additional elaboration.

(Pet. App. at 37a). However, the collateral attack bar does not depend upon whether an injunctive order conflicts with the public interest as found by an administrative agency, but upon whether the defendant company would be "enjoined from doing" what the administrative agency has authorized. *Venner*, 271 U.S. at 130. In any event, in rejecting RLEA's petition to stay the P&LE line sale under the *Ex Parte No. 392* procedures, the ICC found both that the "public interest does not support a grant of a stay" and that "it is in the public interest to allow the class exemption [authorizing the sale] to take effect * * *." (Pet. App. at 103a).[8]

Finally, RLEA has contended that the prohibition on collateral attacks should be ignored in cases like this because the ICC does not enforce the RLA as such. But that misses the point entirely. The *essence* of the collateral attack doctrine under *Venner* is that plaintiffs cannot avoid the jurisdictional constraints on review of ICC orders merely by couching their prayers for relief under another theory. Moreover, in determining the public interest, the ICC *is* required to take into account the interests of employees implicit in the policies of the

[8] More generally, the ICC has concluded that line sales authorized under *Ex Parte No. 392* procedures are "overwhelmingly beneficial," leading to "the revitalization of the marginal railroad sectors—a restructuring * * * in the interest of carriers, labor, and the shipping public." *FRVR Corp., supra* (Pet. App. at 109a, 111a, 118a). The ICC, further, has expressly concluded that line sales under *Ex Parte No. 392*, however beneficial they may be, are unlikely to go forward if the seller is forced to pay costly employee protection, and that the employees' best protection lies in the preservation of jobs encouraged by such sales. *Ex Parte No. 392, supra*, 1 I.C.C.2d at 814-15; *FRVR Corp., supra* (Pet. App. at 110a, 111a). Thus, there can hardly be any question that the unions' "efforts to enjoin the sale * * * constitute, in effect, an effort to overturn an administrative determination that a delay or collapse of the sale and the imposition of labor protection would harm the public interest." *P&LE II* (Pet. App. at 37a-38a).

RLA, 49 U.S.C. § 10101a(12), and the ICC has the power, where appropriate, to "leave the resolution of [a labor protection] dispute to the Railway Labor Act machinery." *Brotherhood of Loc. Eng.* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). Its determinations in that regard are subject to direct review under the Hobbs Act.[9]

What this Court said with respect to the overlap of the Interstate Commerce Act and the Sherman Act in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), is instructive here:

> "* * * Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such * * *. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.
>
> "But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in

[9] That review is meaningful, as the Ninth Circuit has demonstrated in remanding § 10901 line sale cases to the ICC for further consideration of the labor protection issue on two recent occasions. *Railway Labor Executives' Ass'n.* v. *United States*, 811 F.2d 1327, 1329-30 (9th Cir. 1987); *Railway Labor Executives' Ass'n* v. *ICC*, 784 F.2d 959, 973 (9th Cir. 1986).

> view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned." *Id.* at 79-80.

Similarly here, it is up to the ICC to determine the precise adjustments the public interest requires in light of the policies of the RLA, and the ICC's determinations in that regard are reviewable exclusively by a court of appeals under the Hobbs Act. 28 U.S.C. § 2342(5). The district court accordingly lacked power to grant the requested relief.

In short, RLEA seeks in this collateral proceeding to block a line sale for the "long and drawn" period it takes to exhaust RLA major dispute procedures,[10] although the ICC has determined that expeditious consummation of the sale is in the public interest and that a stay is not. It seeks to block the sale in order to secure labor protection, although the ICC has found such protection presumptively contrary to the public interest. And it seeks authority to engage in strikes to block the transaction entirely. The requested relief is not merely a collateral attack on the ICC's determinations; it is a frontal assault. It should not be permitted.

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[10] This Court, for good reason, has characterized RLA major dispute procedures as "long and drawn out," *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966), as "almost interminable," *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969), and as "virtually endless," *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1850 (1987).

CONCLUSION

For the foregoing reasons, and for reasons stated in the brief of the petitioner, the decision in *P&LE II* should be reversed.

Respectfully submitted,

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